SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1971
No. 71-375

VERY EDWARD THAYER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Answer to Petition for a Writ of Certiorari to the Appellate Department of the Superior Court of the State of California, in and for the County of Orange.

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Statement of Facts.

The minutes of the Municipal Court of West Orange County Judicial District are attached to the Petition, and show that Complaint No. 33188 was filed in that court on August 8, 1970, charging Petitioner with Violation of California Vehicle Code Section 23102(a) in that on that same day Petitioner had been driving a vehicle upon a highway while under the influence of intoxicating liquor or under the combined influence of intoxicating liquor and any drug. The Petitioner had suffered a prior conviction for the same offense and the prior conviction is duly alleged in that Complaint. The California Vehicle Code provides a higher penalty for those who have suffered such a prior conviction.

After several continuances requested by Petitioner and his attorney, Petitioner, prior to trial moved the Court to set aside the prior conviction. The *grounds*

for the motion are reflected in the minutes of the Municipal Court (page 2 of Attachments to the Petition) wherein it is stated:

> Motion by defendant to have prior conviction of 3-18-69 in West Orange County Municipal Court declared constitutionally invalid in that the record does not show a jury waiver, waiver of confrontation, or a waiver of self-incrimination.

Those same minutes reflect that on March 19th:

> "Defendant . . . denies prior on ground that it is untrue and further defendant moves the prior be found constitutionally invalid per *Boykin v. Alabama.*"

The settled statement of facts on appeal which with the Minutes of the Court relating to the offense of August 8, 1970, and with those relating to the taking of the prior plea constitute the totality of the record on appeal, states:

> "Counsel for defendant moved the Court to declare the 1969 prior conviction unconstitutional as a matter of law."

The Minutes of the West Orange County Municipal Court relating to the prior conviction are reported at pages six and seven of the Attachments to the Petition. They show that a complaint alleging Violation of section 23102a of the California Vehicle Code was filed against Petitioner in November, 1968. On November 16th Petitioner appeared in court *with private counsel,* plead not guilty to the charge, and demanded a jury trial, which, Petitioner having duly waived statutory time, was set for December 17, 1968.

On December 17, 1968, Petitioner *appeared in Court with counsel,* again waived statutory time, requested

and obtained a continuance to the *jury trial* date to February 4, 1969.

On February 4, 1969, Petitioner appeared in Court *with his counsel,* once more waived statutory time, and demanded and obtained a continuance of his *jury trial* to March 18, 1969.

On March 18, 1960, Petitioner, *once more in court with his counsel,* withdrew his plea of not guilty and entered his plea of guilty.

Questions Presented.

1. Whether the Petitioner was denied any of his constitutional rights by the procedure which in determining the validity of a prior conviction placed on him the burden of alleging and making a *prima facie* showing that at the time he changed his plea from not guilty to guilty he had not *in fact* been advised of his constitutional rights.
2. Whether an opinion of the United States Supreme Court which merely has the effect of changing the burden of proof without altering the intrinsic constitutional rights of a defendant should be given retroactive application in *any* instance when to do so would seriously and overwhelmingly burden the administration of justice by requiring a reconsideration of about one-third of all cases heard and adjudicated since *Boykin v. Alabama.*
3. Whether the law of the State of California controlling the adjudication of the validity of prior convictions violates any provision of the United States Constitution.

ARGUMENT.

I.

The Procedure for Determining the Validity of a Guilty Plea Set Forth by the California Supreme Court Requires a Defendant to Allege Constitutional Deprivation of Rights.

Petitioner, at page 3 of his Petition, makes the following contention:

> "Petitioner's prior conviction rested on a plea of guilty entered by him in March, 1969. Petitioner entered his plea without beng [sic] advised by the court that in so doing he was waiving three important federal rights—i.e., the privilege against self-incrimination; the right to confrontation; and right to trial by jury. Accordingly, he made no express or implied waiver of these rights since he was not even aware they were relinquished by pleading guilty."

Ab Initio it must be stated that *had* Petitioner made such contention the procedure set forth by the California Supreme Court for determining the validity of a guilty plea would have required the court to make a finding of fact. The Supreme Court of the State of California in *People v. Coffey*, 67 Cal. 2d 204, 217 has stated:

> Although the facts of this case do not call upon us to delineate the nature of the contemplated hearing, we do so for the guidance of courts and counsel who will be called upon to deal with similar matters in the future: *First*, when a defendant, whether by motion to strike the prior conviction or convictions on constitutional grounds, or by denial of such prior conviction or convic-

> tions on constitutional grounds at the time of entering his plea to the same, raises the issue for determination, the court shall, prior to trial, hold a hearing outside the presence of the jury in order to determine the constitutional validity of the charged prior or priors in issue. *Second*, in the course of such hearing the prosecutor shall first have the burden of producing evidence of the prior conviction sufficient to justify a finding that defendant "has suffered such previous conviction." (Pen. Code, §1025.) *Third*, when this prima facie showing has been made, the defendant shall thereupon have the burden of producing evidence that his constitutional right to counsel was infringed in the prior proceeding at issue. *Fourth*, if defendant bears this burden, the prosecution shall have the right to produce evidence in rebuttal. *Fifth*, the court shall make a finding on the basis of the evidence thus produced and shall strike from the accusatory pleading any prior conviction found to be constitutionally invalid.

To raise the issue of constitutionality, however, a defendant must set forth an allegation that he was in fact deprived of his constitutional rights. On this point *People v. Coffey*, 67 Cal.2d 204, 215 states:

> We emphasize, however, that the issue must be raised by means of allegations which, if true, would render the prior conviction devoid of constitutional support. "One seeking to challenge prior convictions charged against him may do so only through a clear allegation to the effect that, in the proceedings leading to the prior conviction under attack, he *neither was represented by counsel nor waived the right to be so represented*."

(Original italics.) (*People v. Merriam* (1967) 66 Cal.2d 390, 397 [58 Cal.Rptr. 1, 426 P.2d 161].)

It should be noted that in *Coffey* the Supreme Court found the defendant's allegations to be sufficient to raise the issue.

The same rule was reiterated in *People v. Williams*, 67 Cal.2d 226, 231-232 where the court stated:

> As noted above, defendant at trial admitted the prior conviction charged against him. It is now contended that the cause must be remanded because the trial court, at the time of such admission, failed to determine on its own motion whether, in the proceedings leading to that prior conviction, defendant's constitutional right to the assistance of counsel was duly preserved. (See *In re Woods* (1966) 64 Cal.2d 3 [48 Cal.Rptr. 689, 409 P.2d 913].) We have recently held, however, that "the burden of initiating inquiry into the constitutional basis of a prior conviction lies with him who would challenge its validity rather than with the trial court," and that a defendant's failure to assume that burden at the trial court level forecloses consideration of the matter on direct appeal. (*People v. Merriam* (1967) 66 Cal.2d 390, 398 [58 Cal.Rptr. 1, 426 P.2d 161]; *cf. People v. Coffey* (1967) *ante*, p. 204 [60 Cal. Rptr. 457, 430 P.2d 15].) The trial record herein discloses no effort by defendant to properly raise the constitutional question, and it therefore lies without the scope of our present review.

In *People v. Merriam*, 66 Cal.2d 390, a case almost identical with the case at hand, the California

Supreme Court sets forth the rules and finds that defendant who had failed to allege *any* gound for invalidity except "a silent record" had not sustained the burden of proof. The court there states:

> Further, and even if the limited scope of direct appeal did not preclude our present consideration of defendant's contention, it is clear that defendant, through unsworn statements of counsel to the effect that "the record is silent" on the issue of representation by counsel, has not made the kind of allegation necessary to constitutional inquiry under our *Woods* and *Luce* decisions. One seeking to challenge prior convictions charged against him may do so only through a clear allegation to the effect that, in the proceedings leading to the prior conviction under attack, he *neither was represented by counsel nor waived the right to be so represented.*

The court at note 7 points out that:

> It is significant that counsel for defendant does not identify the "record" upon whose "silence" he relies. If he has reference to the transcript, minutes, and judgment of the proceedings wherein defendant admitted the prior conviction, it is clear that the silence of this record is the very factor which precludes our consideration on direct appeal of the issue sought to be raised. The failure of the record *of the proceedings leading to the prior conviction itself* to establish representation by, or an intelligent waiver of, counsel is a pertinent factor supportive of allegations of constitutional defect, but such failure is of no relevance absent allegations properly made.

The rationale behind the rule of the California Supreme Court is set forth in *In re Woods*, 64 Cal.2d 3, 9 where the court points out:

> It is clear, however, that the matter of waiver of constitutional rights is to be determined on the *facts* of each particular case (*In re Johnson, supra*, 62 Cal.2d 325, 335), and that an inflexible exclusive adherence to the strict record is neither constitutionally required nor in the best interests of effective judicial administration. This consideration is the more apparent when, as here, we examine convictions entered long before the right sought to be enforced was judicially articulated. *Though we must insist that past convictions stand the test of current constitutional principles relative to the right to counsel, we cannot reasonably insist that the record of those convictions reflect impossible prescience.* (Emphasis added.)

In support of its position the California Supreme Court argued as follows:

> In *Rice v. Olson*, 324 U.S. 786 [65 S.Ct. 989, 89 L.Ed. 1367], it was held that, although the Fourteenth Amendment would not permit a presumption of waiver from the appearance of the accused without counsel and the silence of the record as to a request, a fact issue as to whether an effective waiver had occurred was raised by his plea of guilty. There petitioner's denial of waiver by word or act was controverted by the state's allegation of waiver, and a hearing was ordered. *Carnley v. Cochran, supra*, 369 U.S. 506, explicitly approved the *Rice* rationale, but held that a hearing was not required in that case because

> the state did no allege that there had been an affirmative waiver. (*Carnley v. Cochran, supra,* 369 U.S. 506, 516.) In the course of that decision the court uttered its well-known language to the effect that waiver will not be presumed from a silent record (*Carnley v. Cochran, supra,* 369 U.S. 506, 516), but it clearly did not hold that non-waiver will be presumed from a silent record. Thus, the clear position of the highest court is that the determination of waiver is not to be based wholly on the strict record of proceedings below, though a party who does not raise the fact issue by proper allegations may be bound by that record.

Again it should be noted that in that case the defendant alleged that *he had not* waived his rights and the court found that issue had properly been joined.

The California Appellate Court have followed the procedure set forth by the California Supreme Court and have been keenly alert to defend the rights of a defendant. Thus in *People v. Newton,* 8 Cal.App.3d 359, 386, for example, after setting forth the rule that:

> Where a prior conviction is constitutionally invalid because the accused was deprived of his Sixth Amendment right to counsel or did not effectively waive it, utilization of the conviction in a subsequent prosecution to support his guilt, enhance his punishment, or impeach his testimonial credibility, is constitutional error. (*Burgett v. Texas* (1967) 389 U.S. 109, 114-116 [19 L.Ed.2d 319, 324-326, 88 S.Ct. 258]; *People v. Coffey* (1967) 67 Cal.2d 204, 218-219 [60 Cal. Rptr. 457, 430 P.2d 15].) When he raises the

> issue in the subsequent prosecution by moving to strike the prior or by denying it (upon constitutional grounds in either instance), the trial court must hold a hearing outside the presence of the jury and make a relevant finding based upon evidence there presented. (*People v. Coffey, supra,* at pp. 217-218.) The required hearing must be conducted even if the issue arises during the trial, so long as the objection is asserted before the case is submitted to the jury. (*People v. Curtis* (1969) 70 Cal.2d 347, 359-361 [74 Cal.Rptr. 713, 450 P.2d 33].)

That Court concluded:

> Recent decisions establish that such inquiry is required before a waiver of counsel can be accepted by a trial court. (E.g., *People v. Carter* (1967) 66 Cal.2d 666, 672 [58 Cal.Rptr. 614, 427 P.2d 214]; *People v. Armstrong* (1969) 274 Cal.App.2d 297, 303 [79 Cal.Rptr. 223].) While defendant's motion and its supporting declaration were drafted inartfully and in obvious haste, they presented a reasonably "clear allegation" by defendant "to the effect that, in the proceedings leading to the prior conviction under attack, he *neither was represented by counsel nor waived the right to be so represented.*" (Original italics.) (*People v. Coffey, supra,* 67 Cal.2d 204 at p.215 [quoting *People v. Merriam* (1967) 66 Cal.2d 390, 397 (58 Cal.Rptr. 1, 426 P.2d 161)].)

Similarly, *People v. Luckett,* 1 Cal.App.3d 248, 253-254 sets forth:

> The unarticulated premise of this argument must be that even if a prior is not subject to collateral attack on a particular ground (*Johnson v. New*

Jersey, 384 U.S. 719 [16 L.Ed.2d 882, 86 S.Ct. 1772]; *In re Sterling*, 63 Cal.2d 486 [47 Cal. Rptr. 205, 407 P.2d 5]; *In re Lopez*, 62 Cal.2d 368 [42 Cal.Rptr. 188, 398 P.2d 380]; *Linkletter v. Walker*, 381 U.S. 618 [14 L.Ed.2d 601, 85 S.Ct. 1731]) the People may nevertheless not use it affirmatively to their advantage. This is an interesting problem which, however, is not before us. In *People v. Coffey*, 67 Cal.2d 204, 215-219 [60 Cal.Rptr. 457, 430 P.2d 15] the court, following its own lead in *People v. Merriam*, 66 Cal.2d 390, 397 [58 Cal.Rptr. 1, 456 P.2d 161], recognized that the defense had certain burdens in connection with raising the constitutional invalidity of prior convictions. *Coffey* was decided several months before the trial in the case at bar. At no time during the trial did the defense claim that the conviction as such was infirm because of a violation of defendant's *Miranda* rights. *Miranda* was relied on only to block admission of the statements defendant had made at the time of the 1962 arrest. If it had become a legitimate issue at the trial of this case where the 1962 conviction, as distinguished from the statements, was tainted, obviously a far more searching inquiry into the circumstances surrounding the guilty plea would have had to be made.

Moreover, it should be noted that *In re Tahl*, 1 Cal.3d 122, points out that it is only where counsel is present and because he is present that it has been considered proper to presume advisement of rights prior to the taking of a plea.

Examined in light of the above cases, the case presently before this Honorable Court is one in which the

Petitioner failed to sustain the incredibility light burden imposed upon him by the California procedure, to wit: the burden of affirmatively alleging a deprivation of constitutional rights—a burden imposed on a defendant who always appeared *with counsel.* As pointed out in the statement of facts Petitioner first moved to strike the prior on the ground that the record was silent as to waiver of his right to a jury trial, his right to be confronted by witnesses and his right to be free from self-incrimination. *He did not,* as he here contends *ever* state that he *in fact had not* voluntarily waived those rights. (See page 2 of Attachments to Petition). At a later time, after the first motion had been denied, on March 19, 1971, he denied the prior conviction "as untrue" and moved "the prior be found constitutionally invalid per *Boykin v. Alabama.*" This contention of "invalidity as a matter of law" rather than *because* he was deprived of a right was carried over into the Appeal to the Appellate Department of the Superior Court of Orange County via the Settled Statement of Facts prepared by Petitioner himself in which he set forth that "counsel for defendant moved the court to declare the 1969 conviction unconstitutional as a matter of law."

Petitioner, therefore, by its refusal to make a properly alleged motion never presented the California court with the issue it now seeks to raise before this Honorable Court since the California court never had the chance to determine whether a pre-*Boykin* record could properly be used as sufficient rebuttal of a claim that the defendant had never been advised of his rights and/or had never properly waived them.

II.

The California Procedure Is Constitutionally Proper.

The procedure set forth in the California Supreme Court cases cited above finds support in the recent opinions of this Honorable Court. In *McCarthy v. United States,* 89 S.Ct. 1166, 1172, 394 U.S. 468 this Honorable Court, in discussing cases where the record failed to show compliance with the mandatory requirements of Rule 11 of the Federal Rules of Criminal Procedure recognized that:

> The effect of that noncompliance (was) an issue that has engendered a sharp difference of opinion among the courts of appeals. In *Heiden v. United States,* 353 F.2d 53 (1965), the Court of Appeals for the Ninth Circuit held that when the district court does not comply fully with Rule 11 the defendant's guilty plea must be set aside and his case remanded for another hearing at which he may plead anew. Other courts of appeals, however, have consistently rejected this holding, either expressly or tacitly. Instead, they have adopted the approach urged by the Government, which is to place upon the Government the burden of demonstrating from the record of the Rule 11 hearing that the guilty plea was voluntarily entered with an understanding of the charge. See, *e.g., Halliday v. United States,* 380 F.2d 270 (C.A. 1st Cir. 1967); *Lane v. United States,* 373 F.2d 570 (C.A. 5th Cir. 1967). In these circuits, if voluntariness cannot be determined from the record, the case is remanded for an evidentiary hearing on that issue. See, *e.g., Kennedy v. United States,* 397 F.2d 16 (C.A. 6th Cir. 1968); *Halliday v. United States, supra.*

Prior to *McCarthy*, therefore, it was unquestionably proper to supplement lacunae in a record through an evidentiary hearing since in some of the cases mentioned by the court this Honorable Court had denied a petition for certiorari (See *McCarthy v. United States, supra,* at notes 22 and 23).

In *Halliday v. United States,* 89 S.Ct. 1498, 394 U.S. 831 the procedure of automatic remand for repleading without hearing set forth in *McCarthy, supra,* was held to have prospective application *only*. By implication, therefore, the *Halliday* holding reaffirms the fact that when the validity of a *pre-McCarthy* plea is involved the plea need not be found invalid as a matter of law merely because the record does not reflect the requirement of Rule 11.

McMann v. Richardson, 90 S.Ct. 1441; *Parker v. North Carolina,* 90 S.Ct. 1458; and *Brady v. United States,* 90 S.Ct. 1463 all reaffirm the long established rule that a *right* to a hearing on the merits does not arise until the defendant has made allegations which, *if true,* would invalidate the conviction. They thus support the California Supreme Court procedure which requires the defendant who wishes to invalidate a *prior conviction* to allege the violation of substantive constitutional rights which render it defective.

III.

The Requirements of Boykin v. Alabama Should Not Be Made to Apply Retroactively.

Respondent submits that the analysis of the California Supreme Court in *In re Tahl,* 1 Cal.3d 122, 134 is the best support for non-retroactivity of *Boykin.* The California Supreme Court in that case analogizes

Boykin with *McCarthy* and concludes that the non-retroactivity of *McCarthy* implies non-retroactivity of *Boykin*. The California Supreme Court further states:

> After pointing out that a defendant could attack an involuntary plea even in the absence of compliance with rule 11 by the trial court—as can a state defendant whose plea was accepted prior to *Boykin* (*cf. Johnson v. New Jersey* (1966) *supra*, 384 U.S. 719, 730 [16 L.Ed.2d 882, 890, 86 S.Ct. 1772])—the *Halliday* court explained what it obviously considered the most significant factors under the circumstances—reliance on the old rule and the effect on the administration of justice—as follows: "In *McCarthy* we noted that the practice we were requiring had been previously followed by only one Circuit; that over 85% of all convictions in the federal courts are obtained pursuant to guilty pleas; and that prior to Rule 11's recent amendment, not all district judges personally questioned defendants before accepting their guilty pleas. Thus, in view of the general application of Rule 11 in a manner inconsistent with our holding in *McCarthy*, and in view of the large number of constitutionally valid convictions that may have been obtained without full compliance with Rule 11, we decline to apply *McCarthy* retroactively." (394 U.S. at p. 833 [23 L.Ed.2d at p. 20].)

The Court then goes on to show that to invalidate all such prior guilty pleas would have indeed "dolorous effect upon the administration of justice". At note 10 the Court states:

> The magnitude of the potential effect on the administration of justice is apparent when we note

> that in California for the years 1960 through 1967 felony convictions obtained on pleas of guilty totaled 173,496. (Crime and Delinquency in California (1967) p. 100.) The number of misdemeanor convictions would be considerably higher.

At note 11 the court makes a valid analogy in giving yet one more reason why *Boykin* should not be retroactively applied:

> A plea of guilty is in essence a confession in open court, and the procedures necessitated by the *Boykin* decision are analogous to those set out for in-custody interrogation in *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694, 86 S.Ct. 1602, 10 A.L.R.3d 974.] In *Johnson v. New Jersey, supra,* the Supreme Court declined to apply *Miranda* retroactively, recognizing that confessions lacking *Miranda* warnings were not necessarily involuntary and that those warnings simply added "important new safeguards" against coerced confessions. Similarly, the absence of *Boykin* warnings does not necessarily negate the voluntary nature of a guilty plea, and the "important new safeguards" herein established may fairly be applied prospectively only.

Boykin and *Miranda,* Respondent submits, present many points of similarity. Both are procedural and both are intended to safeguard already existing constitutional rights. Both substantially affect a large segment of prior judgments. Both, it is submitted, should be treated in like manner and be non-retroactive in their application.

IV.

If Boykin Is Not Given Retroactive Application in Some Proceedings Such as Habeas Corpus Proceedings, Logic Requires It Not to Have Retroactive Application in Determining the Validity of Prior Convictions for Purposes of the Recidivist Statutes.

To give *Boykin* retroactive application for some purposes and not for others would obviously lead to a multiplicity of hearings and create havoc with the *res judicata* doctrine. By contrast if the *res judicata* is upheld and *Boykin* is made retroactive for purposes of the recidivist statutes only, the result would be to encourage crime.

The California Supreme Court has often time held that a defendant may attack the validity of a prior conviction on constitutional grounds even *after* the sentence has been served. In *Thomas v. Department of Motor Vehicles,* 3 Cal.3d 335, 337 for example, the California Supreme Court held:

> Ordinarily a judgment is presumed valid if collaterally attacked, unless it is void on its face. (*People v. Davis,* 143 Cal. 673, 675 [77 P. 651]; see 3 Witkin, Cal. Procedure (1954) Attack on Judgment in Trial Court, §§ 2-6, pp. 2044-2050.) However, a judgment of prior conviction, even though valid on its face, may be attacked at any time on constitutional grounds in a proceeding in which by reason of such prior conviction increased sanctions may be imposed against the person suffering it. (*Hasson v. Cozens,* 1 Cal. 3d 576, 579 (2) [83 Cal.Rptr. 161, 463 P.2d 385]; *People v. Coffey,* 67 Cal.2d 204, 214-215

[60 Cal.Rptr. 457, 430 P.2d 15].) Therefore, petitioner in the 1968 proceeding against him could have attacked the 1966 judgment, which served as a basis to increase the sanctions against him; and the municipal court's ruling on the issue in that proceeding would have been res judicata thereon. (*Hasson v. Cozens, supra,* 1 Cal.3d 576, 579-580 (2, 3).)

In light of the above rules of California procedure, should *Boykin* be made retroactive as to alleged priors and not as to *Habeas Corpus* proceedings, if a defendant convicted of a prior were to proceed by way of *Habeas Corpus,* the conviction contended invalid on procedural grounds would *not* be struck down. If he subsequently were to be accused of another violation in case of a violation of Vehicle Code Section 23102 (a), the ruling on *Habeas Corpus* would be *res judicata* and the prior allegation would be valid. On the other hand, if the defendant did not proceed by *Habeas Corpus* and he later were accused of a subsequent violation, he would be able to obtain a hearing on procedural grounds and *possibly* get his prior conviction set aside. The result would thus be that the *only* persons who could benefit from such a rule would be those who were accused of breaking the law a *second* time since they would be the only ones who could get the conviction set aside on procedural grounds. Clearly such a result would fly in the face of the very purpose of the so-called recidivist statutes. Conversely, this type of procedure would be to the disadvantage of a defendant who might prefer not to petition for writ of *Habeas Corpus* if, by so doing, he were to preclude an easier determination of validity at a later time if and when he were to be convicted again.

That the validity of prior convictions should be, if anything, less carefully scrutinized when the prior conviction merely augments the penalty for a subsequent crime is best set forth in the concurring opinion of Chief Justice Warren in *Spencer v. Texas,* 385 U.S. 554, 17 L.Ed.2d 606 wherein the then Chief Justice analyzed case No. 70 as follows:

> No. 70, however, raises the question of whether a decision that the old Texas procedure violates due process should be retroactively applied to convictions which are final but which are collaterally attacked in the federal courts by habeas corpus. Connsiderations of fundamental fairness have led to the opening of final judgments in criminal cases when it has appeared that a conviction was achieved in violation of basic constitutional standards. Thus, in the decisions which have been applied retroactively, *Gideon v. Wainwright,* 372 U.S. 335, 9 L.ed.2d 799, 83 S.Ct. 792, 93 A.L.R. 2d. 733 (1963); *Douglas v. California,* 372 U.S. 353, 9 L.ed.2d 811, 83 S.Ct. 814 (1963); *Griffin v. Illinois,* 351 U.S. 12, 100 L.ed. 891, 76 S.Ct. 585, 55 A.L.R.2d 1055 (1956); and *Jackson v. Denno,* 378 U.S. 368, 12 L.ed. 2d 908, 84 S.Ct. 1774, 1 A.L.R.3d 1205 (1964), the Court concluded that the constitutional error perceived undermined "the very integrity of the fact-finding process," *Linkletter v. Walker,* 381 U.S. 618, 639, 14 L.ed. 2d 601, 614, 85 S.Ct. 1731 (1965) and the fundamental fairness of the resulting conviction. On the other hand, our decisions in *Linkletter and Tehan v. Shott,* 382 U.S. 406, 15 L.ed. 2d 453, 86 S.Ct. 459 (1966), demonstrate that practices found to violate the

> Due Process Clause of the Fourteenth Amendment need not necessarily be applied to final convictions. The factors adverted to in those cases for determining whether a constitutional decision should be applied to final cases were the State's reliance on the conduct newly found unconstitutional, whether the purpose of the new rule would be served by fully retroactive effect, and the effect of retroactivity on the administration of justice.

Interestingly prior to making the above statement the Chief Justice had set forth his ideal system of procedure concerning the allegations and use of priors. Later in the decision he points out that the California procedure has:

> substantially mitigated the prejudice of the single-stage recidivist procedure by affording the defendant the right to stipulate to his prior crimes to prevent their introduction at the trial.

After pointing out that in all cases where the constitutional doctrine had been retroactively applied the procedure had gone "to the heart" of the fairness of the conviction, the Chief Justice concluded:

> In contrast to the unconstitutional procedures involved in the cases discussed above, the admission of prior-convictions evidence in connection with a recidivist statute does not seem to me to justify reversal of final convictions. The fact that prior-convictions evidence has been traditionally admitted when related to guilt or innocence suggests that its prejudice has not been thought so great as to undermine "the very integrity of the fact-finding process" and to involve a "clear danger

> of convicting the innocent." See *Linkletter v. Walker,* 381 U.S. 618 at 639, 14 L.ed2d 601 at 614; *Tehan v. Shott,* 382 U.S. 406 at 416, 15 L.ed.2d 453 at 459. Consequently, I would not apply a decision in line with this dissent to final convictions, such as No. 70, a habeas corpus proceeding.

Burgett v. Texas, 88 S.Ct. 258, 389 U.S. 114 is not here in point. That case was based on the fact that:

> During the course of the trial, while the jury was present, the State offered into evidence a certified copy of one of the Tennessee convictions. The conviction read in part, "Came the Assistant Attorney-General for the State and the Defendant in proper person and without Counsel." Petitioner's counsel objected to the introduction of the record on the ground that the judgment on its face showed that petitioner was not represented by counsel in violation of the Fourteenth Amendment.

The *Burgett* court properly concluded that the record on *its* face showed a positive denial of the right to counsel. The ruling was also based on the predetermined retroactivity of *Gideon v. Wainwright,* 372 U.S. 335. It does not, as Petitioner contends stand for the proposition that the same result must follow where as here the Petitioner alleges no violation of rights except that the record does not reflect advisement; where as here all that the Supreme Court has done is deny *a presumption* of validity (for *Boykin* cannot be contended to go as far as *McCarthy* although so interpreted by the California Supreme Court); and, finally, where as here *all* that the prior conviction does is enhance the penalty, and is not an element of the crime (*Cf. People v. Hudgins,* 59 Cal.App.2d 175). Re-

spondent thus urges this Honorable Court to reaffirm the principles of *Carnley v. Cochran,* 369 U.S. 506 as interpreted by the California Supreme Court in *In re Woods, supra,* wherein the California Supreme Court stated:

> In the course of that decision the court uttered its well-known language to the effect that waiver will not be presumed from a silent record (*Carnley v. Cochran, supra,* 369 U.S. 506, 516), but it clearly did not hold that non-waiver will be presumed from a silent record. Thus, the clear position of the highest court is that the determination of waiver is not to be based wholly on the strict record of proceedings below, though a party who does not raise the fact issue by proper allegations may be bound by that record.

In light of all the above reasons and for the additional reason that the retroactive application of *Boykin* in determining the validity of prior convictions would require the retrial of an estimated one-third of the convictions obtained since *Boykin* (approximately 5000[1] cases in Orange County alone), Respondent respectfully urges this Honorable Court to deny the Petition.

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[1]This figure was arrived at by checking the files of the District Attorney's Office for the number of convictions either by trial and/or by guilty plea obtained since *Boykin* in both misdemeanors or felonies. By sampling the complaints and Indictments, one-third of all cases filed appear to allege priors. These statistics are thus a mere approximation and in no way are they to be interpreted as representing an actual and exact figure.

Dated this 30th day of November, 1971.

Respectfully submitted,

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